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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 364

FALSTAFF BREWING CORP., GOEBEL BREWING COMPANY OF CALIFORNIA, MONTEVERDE & PARODI, INC., RALPH MONTALI, INC., PACIFIC GAS & ELECTRIC COMPANY, PABST BREWING COMPANY, HARRY F. RATHJEN CO., SAN FRANCISCO BREWING CORPORATION, MELVIN SOSNICK COMPANY, TWIN PEAKS DISTRIBUTING CO., VICK'S DISTRIBUTING COMPANY, N. CERVELLI & COMPANY, CALIFORNIA WINE ASSOCIATION, BROWN & BIGELOW, CARLO ARBASETTI, THE ALBERT PETERS CO.,

Petitioners,

vs.

KAL W. LINES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

SHAPRO & ROTHSCHILD,
ARTHUR P. SHAPRO,
AUGUST B. ROTHSCHILD,
155 Montgomery Street, San Francisco 4, California,
Attorneys for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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Petitioners,

vs.

KAL W. LINES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The Petition of Falstaff Brewing Corp., Goebel Brewing Company of California, Monteverde & Parodi, Inc., Ralph Montali, Inc., Pacific Gas & Electric Company, Pabst Brewing Company, Harry F. Rathjen Co., San Francisco Brewing Corporation, Melvin Sosnick Company, Twin Peaks Distributing Co., Vick's Distributing Company, N. Cervelli & Company, California Wine Association, Brown & Bigelow, Carlo Arbasetti, The Albert Peters Co., respectfully shows to this Honorable Court:

INTRODUCTION.

This was an appeal from an Order of the United States District Court for the Northern District of California, and the amendment thereto (T.R. 93-97) reversing an Order of a Referee in Bankruptcy appointing Respondent as Trustee of the estate of Alfonso Paul San Filippo, Bankrupt, and directing said Referee to appoint John M. England, the nominee of your Petitioners, as such Trustee (T.R. 94-97). The action arose at the First Meeting of Creditors of the San Filippo bankruptcy proceedings and involves the contested election of the Trustee. After due proceedings on the said appeal, the Court of Appeals for the Ninth Circuit, on the 15th day of May, 1956, entered its judgment reversing the order of the District Court (233 Fed. 2d 927, T.R. 110-122; Appendix A) and directing the District Court to affirm the Order of the

Referee. Thereafter, Petitioners filed their Petition for Rehearing with said Court of Appeals, which Petition was on the 15th day of June, 1956, denied (T.R. 124; Appendix C).

JURISDICTION.

The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(1) and 11 U.S.C.A., Section 47 (c), Bankruptcy Act Section 24(c).

QUESTION PRESENTED.

Are creditors who are members of a trade organization, the Secretary of which acted as an Assignee for the benefit of creditors of an insolvent Debtor, barred from voting their own and other claims for the election of an otherwise fully qualified person as Trustee in Bankruptcy of that Debtor solely by reason of the fact that through that trade organization the claims in question were solicited for voting purposes in the name of the Creditors' Committee which procured the assignment from the insolvent Debtor?

STATUTES INVOLVED.

Bankruptcy Act Section 44(a) (11 U.S.C.A., Section 72(a)) which provides:

> "(a) The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its

board of directors, or trustees or of other similar controlling bodies, shall, at the first meeting of creditors after the adjudication . . . appoint a trustee . . . of such estate."

FACTS.

Petitioners are sixteen (16) creditors of the above estate whose claims aggregate $3,735.56. These claims, plus those of four other creditors, Edwin J. Marino, Pacific Coast Brands, Eagle Vineyard Products and Gallo Sales Company, were all duly presented for voting at the first meeting of creditors of the above attorneys in fact designated in the Powers of Attorney contained in their respective proofs of claim. Said twenty (20) claims aggregating $4,508.67 were so voted for John M. England, as Trustee of the above estate. There were voted for Respondent, Kal W. Lines, only five (5) claims totaling $407.22. Only one (1) of the twenty (20) claims voted for Mr. England, to wit, one claim for $193.85, of Pacific Coast Brands, which was voted by Mr. England personally, was not objected to by Respondent.

While the record is somewhat obscure as to the exact nature and grounds of the objections made on behalf of Respondent to the voting of the nineteen (19) claims for Mr. England, it would appear that said objections are based entirely upon an alleged impropriety of permitting these creditors to select a trustee herein. These claims were admittedly solicited by the Creditors' Committee of this bankrupt at the

Board of Trade of San Francisco on the letterhead of the latter (which letter was signed by the five (5) members of the Creditors' Committee).

Under these circumstances, Petitioners contend that the only basis upon which they, as creditors, could properly have been disenfranchised by the Referee in Bankruptcy and their preponderance of voting claims, in both number and amount, for Mr. England as Trustee disregarded and disapproved by the Referee's Order herein, was that their nominee, if elected, would have an interest adverse to the estate in question and/or would not fairly and honestly administer same.

Reasons relied upon for the allowance of this Writ:

1. *That the decision of the Court of Appeals* is contrary to law and legal precedent and *is in conflict with a decision of the United States Court of Appeals for the Tenth Circuit (In the Matter of Garrison v. Pilliod Cabinet Co., et al.,* 50 Fed. 2d 1035, 18 A.B.R. (n.s.) 409).

2. That the Court of Appeals has decided an important question of Federal law which has not heretofore been, but should be, settled by this Court.

3. That the effect of the decision of said Court of Appeals is widespread and will result in the *disenfranchisement* of creditors because they are members of legitimate trade associations which, in the interests of orderly liquidation of the assets of insolvent debtors, procure and administer assignments for the benefit of creditors generally and which creditors

would otherwise be clearly entitled to vote their claims for the election of a Trustee in bankruptcy proceedings.

4. That the matter here involved is one of vital importance to the administration of the estates of bankrupts under the Bankruptcy Act throughout the United States and one which it is in the public interest to have decided by this Court of last resort.

ARGUMENT.

I.

THE COURT OF APPEALS IN FINDING THAT THERE WAS EVIDENCE TO SUPPORT THE REFEREE'S FINDING THAT THE VOTES OF PETITIONERS REPRESENT AN ATTEMPT BY THEM TO RETAIN "SOME SORT OF CONTROL" OVER THE BANKRUPT ESTATE FOR THE BENEFIT OF THE BOARD OF TRADE WAS IN ERROR FOR THE REASON THAT THE FINDING BY THE REFEREE WAS CLEARLY ERRONEOUS AND WAS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE AND/OR REASONABLE INFERENCE.

The opinion of the District Court in this case may be found in 130 Fed. Supp. 312 and at pages 79-85 of the Transcript of Record herein.

The opinion of the Court of Appeals for the Ninth Circuit may be found in 233 Fed. 2d 927 and at pages 110-122 of the Transcript of Record herein (Appendix A).

The Bankruptcy Act, Section 44(a), 11 U.S.C.A., Section 72(a) provides:

> "(a) *The creditors* of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stock-

holders or members, its officers, and the members of its board of directors, or trustees or of other similar controlling bodies, *shall*, at the first meeting of creditors after the adjudication . . . *appoint a trustee . . . of such estate.*" (Italics ours.)

Obviously, none of your Petitioners are within the class excluded from voting by the foregoing statutory provision. Prior to February 13, 1939, under General Order in Bankruptcy, No. 13, 11 U.S.C.A., page 53, as of which date it was abrogated by the Supreme Court of the United States, the appointment of a trustee by the creditors was "subject to be approved or disapproved by the Referee." We can find neither in the General Orders in Bankruptcy nor in the Bankruptcy Act itself any similar or revised provision giving the Referee in Bankruptcy any such specific authority. It would seem, therefore, that although prior to February 13, 1939 (under conditions which will be hereinafter discussed, and which are wholly inapplicable to the case at bar), the referee might have undertaken to disapprove the election of a trustee, under the law applicable to the case at bar, the referee obviously was not justified in so doing. It should here be noted that the abrogation of former General Order No. 13 in February 1939 was made shortly after the Chandler Act Amendment to the Bankruptcy Act became effective in September 1938. Previously, Section 44(a) did not specifically provide the exceptions to the absolute right of creditors to appoint a trustee, hence the supervisory jurisdiction conferred upon the referee by the Supreme Court's

General Order. The 1938 Amendment to Section 44(a) gives the specific exceptions, hence the supervisory powers of the Referee elections were deemed unnecessary.

That a Bankruptcy Court is a Court of equity and that the broad principles and rules of equity jurisprudence govern and apply in the administration of bankrupt estates is not disputed by Petitioners. However, the exercise of the equitable principles and the discretion conferred upon the Referee in Bankruptcy must be in conformity with law and as was stated by District Judge Carter in his Memorandum and Order of March 31, 1955 (T.R. 84, 130 F. Supp. 312) the Referee cannot, to support his order:

> "*torture some adverse or conflicting interest or prejudicial association, which would disenfranchise any offending creditors, even though the trustee proposed by such creditors is under no such alleged disability except through the creditors who propose him.* Such an interpretation would frustrate the purpose behind the provisions of the Bankruptcy Act authorizing the election of the trustee by creditors. Any creditor for whose benefit an assignment had been made before bankruptcy would be automatically disqualified. It commonly occurs that creditors who agree on the selection of a creditors' committee will agree on a candidate for the trustee in bankruptcy, and *the mere fact that these same creditors are members of a trade association should not, without more, operate to disqualify the votes of the great majority of creditors.*" (Italics ours.)

In both his Summary of Record, Findings of Fact and Conclusions of Law Relative To Contest Over Election of Trustee in Bankruptcy, (T.R. 46-55) and his Certificate and Report of Referee relative to Petition for Review of Referee's Order of May 26, 1956 (T.R. 27-45), the Referee cites numerous cases in support of his position, none of which involve contested elections of a Trustee in Bankruptcy which took place after the abrogation of General Order in Bankruptcy No. 13. For that reason, we feel they are not important. However, on the general subject of the alleged "adverse interest", and in keeping with the theory of the Referee and of the Court of Appeals that even without such General Order, the Referee has the power to sustain objections to the election as Trustee of a person disqualified by adverse interest or by lack of personal qualifications and/or integrity, these cases will be discussed and distinguished.

In re Stowe, 235 F. 463, 38 Am. B.R. 76, was a case in which there was evidence that the bankrupt was involved in soliciting the claims for the disqualified candidate for the Trustee, and also indication that the attorney for the assignee for the benefit of creditors was attempting to control the election. No such facts appear in the instant case.

In re Leader Mercantile Co., (C.C.A. 5) 36 F. (2d) 745, 746, involves a situation where one Hall, who received votes of the majority in number and amount of claims withdrew and took no further part after the Referee vetoed his election by reason of his activities in soliciting claims. Strangely enough, one of

the points overruled by the court in that case was the alleged lack of authority in the Supreme Court to adopt General Order No. 13. The decision is based principally upon the now abrogated General Order No. 13, and, further restricts the rights of creditors to select the trustee *only* to the extent that their nominee be a "competent person". The court there holds that "competent" within the intent of the Act has a very broad meaning equivalent to "qualified" and fulfilling all the requirements of the case, and further, "while undoubtedly the policy of the courts is to permit the creditors to have the broadest latitude in the administration of the bankrupt's estate, nevertheless the courts are charged with the duty of supervision, and there is always the power in a court to intervene to prevent the selection of an *incompetent* person as trustee. *Of course, this power is not to be used arbitrarily but only for good cause, in the exercise of sound judicial discretion.*" (Italics ours.) This latter quotation does not appear in the Referee's notes nor in the Respondent's brief, and supports Petitioners' position herein.

In re Deena Woolen Mills, (D.C., Me.), 114 F. Supp. 260, 267, 268, involves an exaggerated and inflammatory situation where the attorneys for the assignee and the receiver solicited claims and where the attorney for the assignee for the benefit of creditors had been selected by the attorneys for the bankrupt. Solicitation of claims by a receiver or his attorney is expressly prohibited by General Order No. 39, which reads as follows:

"Neither a receiver nor his attorney shall solicit any proof of claim, power of attorney, or other authority to act for or represent any creditor for any purpose in connection with the administration of an estate or the acceptance or rejection of any arrangement or plan."

Langnes v. Green, 282 U.S. 531, 541, 51 S.Ct. 243, 247, 75 L.Ed. 520, 526, is merely an admiralty case.

The case of *Delno v. Market St. Ry. Co.,* (C.C.A. 9), 124 F. (2d) 965, 967, is inapplicable to the case at bar, and merely defines the legal concept of a court's "discretion".

By statute, the unqualified right to appoint trustees in bankruptcy vests in the creditors. (*In re Harris Construction Company,* 37 F. (2d) 951, 14 Am. B. R. (n.s.) 641.) Approval or disapproval of their choice must be for reason, and based on the exercise of wise discretion. There must be reason for disapproval or removal.

In re Mayflower Hat Co., Inc., 65 F. (2d) 330;
In re Harris Construction Company, supra;
In re Bay Parkway Haberdashers & Hatters, Inc., 59 F. (2d) 103;
In re Van de Mark, (D.C.), 175 Fed. 287, 23 Am. B. R. 760;
In re Malino, 118 F. 368, 8 Am. B. R. 205.

Remington on Bankruptcy, Fourth Edition, Volume 2, Section 1094, page 631, at 633:

"All must agree that the vital interest which creditors have in the preservation and wise management of the estate of the bankrupt, must, as a

general rule, make them the best judges of who shall be appointed as trustee, and their selection cannot be arbitrarily ignored."

Wilson v. Continental Building and Loan Association, 232 F. 824, 37 Am. B. R. 444.

"The choice of the creditors should not be overruled by the Referee or District Judge except for substantial reasons, and the confirmation by the District Judge of such appointment should not be disturbed by this Court unless an abuse of discretion appears."

In re Merritt Construction Company, 219 F. 555, 33 Am. B. R. 616.

"If the persons appointed by creditors are competent to perform the duties, and if they have residence or an office in the District, the Creditors' appointment should be approved."

Remington on Bankruptcy, supra, page 633.

"The policy of the Bankruptcy Act as shown in its provisions is to give to creditors of the Bankrupt the free, deliberate and an unbiased choice in the first instance of the persons who are to represent them and manage the assets of the Bankrupt estate. (*In re Lewensohn*, supra.) It cannot be denied that the vital interests which creditors have in the preservation and wise management of the estate of a bankrupt must as a general rule make them the best judges of who shall be appointed as Trustee, and their selection cannot be arbitrarily ignored."

In re Allied Owners Corp., Bankrupt, 4 F. Supp. 684, 24 Am. B. R. (n.s.) 151.

In re Allied Owners Corp., supra, involves a petition for review of an order disapproving an election of one Greve as trustee on the grounds of partiality in or connected with the transaction and affairs of the bankrupt, and wherein the Referee's order was reversed. The court discussed the rights of creditors in the election of a trustee, and, in finding that Greve was merely associated with affiliated companies of the bankrupt, held that this was not sufficient to disqualify him, and pointed out that his familiarity with the business enhanced his desirability.

> "Courts should not assume that *creditors* cannot elect an impartial Trustee. *Their choice should be recognized and upheld unless contrary to law* or it appears that the Trustee so selected has interests which conflict with those of the general creditors of the bankrupt estate, (*In re Mayflower Hat Co.,* (C.C.A.) 65 F. (2d) 330, 331), or unless there is reason for believing that the selection has been directed, managed, or controlled by the bankrupt or his attorney, or by some influence opposed to the creditors' interests. (*In re Eastlack,* (D.C.) 145 F. 68, 73.)
>
> The sole power conferred by the Bankruptcy Act on the Referee or judge in relation to the appointment of a Trustee is contained in Section 44 (11 U.S.C.A. 72, supra) where it is provided that, if the creditors do not appoint, 'the court shall do so.' *The Act, therefore, contains no provision conferring on the Referee or judge the right to disapprove an appointment made by the creditors.* (*In re Krueger,* (D.C.) 196 F. 705, 707.) The right to do so is to be found in General Order 13 (11 U.S.C.A., p. 53) promulgated by

the Supreme Court pursuant to statute, which provides: 'The appointment of a trustee by the creditors shall be subject to be approved or disapproved, and he shall be removable, by the referee or by the judge.'

Thus *by this General Order courts of bankruptcy are vested with a supervisory power* to meet emergencies and exigencies which could not be foreseen or provided for in the statute. But the emergency must not be a trivial one. It should be of grave character and due weight, or *the effect of the use of this supervisory power is to disenfranchise the creditors and deprive them of rights expressly conferred upon them by statute.* (*In re Lloyd,* (D.C.), 148 F. 92, 93.) Since this is the ultimate result of the use of this supervisory power, its use must be sparingly exercised with sound judicial discretion and not arbitrarily or capriciously." (Italics ours.)

The above indicates that even this limited supervisory power in the Court was derived from the now abrogated General Order No. 13.

In *In re Mayflower Hat Co., Inc.,* 65 F. (2d) 330, on principle, it cannot be perceived why an agent for a creditor should not be permitted to vote as a creditor might, if by so voting he is not disqualified to vote for himself to act as trustee. If the creditors who have unsecured claims filed and allowed . . . may vote for themselves, they may authorize agents to vote, and the majority of creditors in number and amount may control the election, and their choice must be upheld by the court, unless it appears that the trustee so elected has an interest adverse to the bankrupt estate.

See, also:

In re Lazoris, (D.C.), 120 F. 716;

In re Van de Mark, (D.C.), 175 F. 287.

In re Cass and Daley Shoe Co., 11 F. (2d) 872, held that if openly and honestly organized and conducted, a Creditors' Committee in bankruptcy proceedings may be of great assistance. Creditors' assignment of claims to Creditors' Committees was held not to disenfranchise them or the representative of such Creditors' Committee from voting for a trustee. The bankrupt may put itself into the hands of such a committee or in the hands of its principal creditors and such an act is not "collusion" in the sinister bankruptcy use of the word, *and these creditors have the right to vote for trustee.*

The Referee, in the order reversed by the District Judge, did exactly what the Circuit Court in the case of Cass and Daley Shoe Co. supra, disapproved, and the latter Court reversed an order of a referee similar to that of Referee Wyman in the instant case, which, by the Order of the District Judge here appealed from was also reversed.

As indicated above, at the hearing before the Referee, Petitioners, through their counsel, made a detailed "offer of proof". (Ref. Cert., T.R. 31-33.) The relevancy of the evidence offered and so improperly rejected by the Referee is obvious from the context thereof in the light of the decisions above cited. In view of the fact that no contrary evidence was either offered or received, it would seem that the record is clearly devoid of evidence to support the

Referee's disenfranchisement of Petitioners. If, as we contend, the offer of proof should have been accepted, the record would overwhelmingly support the propriety of the election of Mr. England by 20 creditors out of the 25 voted, and whose claims aggregated over 95% of the amount thereof.

The complete lack of control or even suggestion of the selection of Mr. England as their candidate by the Board of Trade, and/or the Creditors' Committee itself, was clearly indicated by the evidence so offered by Petitioners and refused by the Referee. The impartiality of the administration of the bankrupt's estate as to Mr. England himself was openly conceded by Respondent (T.R. 35).

> "Mr. Shapro. . . . If I may, I should like to direct a question to Mr. Margolis in connection with this objection, so the record may be clear. I would like to know if it is your contention, Mr. Margolis, that if Mr. England's election as trustee in this case were approved by this Court, that he would administer this estate other than impartially, fairly and accurately?
>
> Mr. Margolis. Absolutely not. . . ."

and it is further emphasized and supported, without contradiction, by all of the evidence in the record and that which was so offered and refused. (Referee's Finding No. 14 (T.R. 54).)

The Referee's decision in this case was not based upon "sound judicial discretion", and was not used "sparingly", and was, in effect, arbitrarily exercised. We are at a loss to understand the action of the Court of Appeals in affirming it.

II.

NEITHER THE BANKRUPTCY ACT NOR THE GENERAL ORDERS PROHIBIT ANYONE BUT A RECEIVER OR HIS ATTORNEY FROM SOLICITING CLAIMS. NOT EVEN AN ASSIGNEE FOR THE BENEFIT OF CREDITORS IS SO DISQUALIFIED.

The decision in *Garrison v. Pilliod Cabinet Co., et al.,* 50 Fed. 2d 1035, 18 Am. B. R. (n.s.) 409 by a Court of equal jurisdiction with the Court of Appeals for the Ninth Circuit was neither cited nor distinguished in the opinion of the Court of Appeals for the Ninth Circuit in its Judgment of the 15th of May, 1956. In the case at bar, we do not have the assignee soliciting the claims (as found in the Garrison case, supra) but merely the Creditors' Committee who admittedly are members of the Board of Trade of San Francisco, of which and for which Mr. Hempy acted as assignee for the benefit of creditors of the bankrupt San Filippo. There was no showing before the trial Court by Respondent and hence there is in the record before this Court no *evidence* to support the insidious implications as to the alleged disqualification of Petitioners and/or of Mr. England, their nominee, which is embodied in and necessarily follows from the opinion of the Court of Appeals for the Ninth Circuit here sought to be reviewed.

That there is no evidence in the record before the Court of Appeals for the Ninth Circuit to support any of the findings which "taken together, however . . .", persuaded this court that "they are findings regarding which 'reasonable men could differ as to the propriety of the action taken'" (T.R. 119). The

distinction between the case at bar and the decision in *In re Stowe*, supra, is obvious; there the connivance complained of was between certain creditors and the bankrupt and/or his attorney, as well as the assignee.

CONCLUSION.

At no time have Petitioners contended that the Referee has no jurisdiction, *in a proper case*, to sustain objections to and/or disapprove the election of a trustee by creditors whose interests are, or might be adverse to the bankrupt estate itself; but conversely, our position is that the Referee's actions in so doing "must be governed entirely upon statutory principles." The statute in question is Section 44(a) of the Bankruptcy Act, 11 U.S.C.A., Sec. 72(a), fully discussed above.

The only basis upon which these creditors could properly have been disenfranchised by Referee Wyman was *if* there was sufficient *evidence* that Mr. England, their nominee, would have an interest adverse to the estate and/or would not fairly and honestly administer same. (Ref. Cert. T.R., p. 38.) *The evidence received by the Referee* as well as that offered by Petitioners and refused by the Referee (Ref. Cert. T.R. 31 through last full paragraph p. 32), *is all to the contrary.*

As he said in his Memorandum and Order (T.R. p. 80), the District Judge gave full weight to the Referee's findings, but found them erroneous. Judge Carter's opinion (T.R. pp. 79-85) clearly indicates

the full consideration given by him to the record, and his order of reversal (T.R. pp. 94-97) is amply justified.

We believe that there was neither substantial legal ground shown before Referee Wyman, nor any evidence upon which his contrary findings or conclusions could be predicated, justifying the disenfranchisement of the vast majority of the creditors who, including Petitioners, selected Mr. England rather than Respondent to act as Trustee of the above estate. The Court of Appeals for the Ninth Circuit's Order of May 15, 1956, should be reversed, and the District Court's Order of March 31, 1955, should be affirmed by this Court.

Wherefore, Petitioners pray that a Writ of Certiorari issue out of this Honorable Court to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above matter on May 15, 1956, under its Docket No. 14,821 and that your Petitioners may thereafter have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, San Francisco, California,
August 24, 1956.

Respectfully submitted,
SHAPRO & ROTHSCHILD,
ARTHUR P. SHAPRO,
AUGUST B. ROTHSCHILD,
By ARTHUR P. SHAPRO,
Attorneys for Petitioners.

(Appendix Follows.)